Ngoi Thiam Woh v CTOS Sdn Bhd & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO 22–87 OF 2001
ABDULL HAMID EMBONG J
30 AUGUST 2001

Civil Procedure *— Injunction — Interim injunction in defamation action — Restraint against proclamation of sale in newspaper — Bona fide defence of qualified privilege — Whether court could grant interim injunction in defamation action — Delay in application for injunction — Whether plaintiff must provide undertaking to damages*

Tort *— Defamation — Injunction — Interim injunction against proclamation of sale in newspaper — Bona fide defence of qualified privilege — Whether court could grant interim injunction in defamation action — Delay in application for injunction — Whether plaintiff must provide undertaking to damages*

The plaintiff was a businessman and the sole distributor of a wide range of health and skin care products. He was also formerly a member of Parliament and a state assemblyman. The first defendant ('CTOS') was a computer database information company which collated information from newspapers, government gazettes, the registries of businesses and companies and stored them into its electronic archive for the information of its customers which included banks. The second defendant ('*The Star*'), was the publisher of a popular daily newspaper and the third defendant was the printer of the second defendant. The plaintiff had, in May this year, filed a suit against the defendants seeking damages for defamation and for injunctive reliefs. In this application, the plaintiff sought for an interlocutory injunction pending the disposal of the suit to restrain the defendants, from, inter alia, publishing and communicating a proclamation of sale ('the proclamation'). The defendants had raised two preliminary objections to this application. Firstly, it was submitted that the affidavit in support did not offer any undertaking for damages. Secondly, it was submitted that there had been a long delay of 40 months in seeking this injunctive relief, a delay for which there was no plausible explanation. The primary issue for determination was whether the court may grant an interim injunction in a defamation action.

Held, dismissing the application:

(1) The court should be slow in granting an interim injunction in a defamation action. The court may only grant interlocutory injunctions of this species if the following factors are satisfied: (i) that the statement is unarguably defamatory; (ii) there are no grounds for concluding that the statement may be true; (iii) there is no other defence which might succeed; and (iv) there is evidence of an intention to repeat or publish the defamatory statement. The burden of proof falls upon the plaintiff, and not on the defendants. In the instant application, the plaintiff had

failed to satisfy the court all of the first three factors stated (see pp 517F, 519B, 520D–E).

(2) The proclamation complained of was, on the face of it, a usual advertisement published on *The Star*, pursuant to its normal day to day transaction. The plaintiff had not satisfied the court that the proclamation was published out of malice. The plea of qualified privilege by the second and the third defendants should therefore be considered by this court as prima facie bona fide defence in refusing the grant of an interim injunction (see p 519G–H).

(3) Form 58 of the Rules of the High Court 1980 ('the RHC'), ie the Form for an order for interim injunction shows that the court, in its discretion, may order that the plaintiff gives an undertaking as to damages. This order on an undertaking may be made by the court if it is of the opinion, after enquiring into the matter, that a defendant would sustain some damages as a result of the injunction granted. Clearly then, this order on the undertaking is left to the court's discretion. The omission to provide for an undertaking for damages in the plaintiff's affidavit or his application is thus not fatal, and that under the RHC, it is a non-mandatory requisite although the general practice, with some exceptions is for the court to require that such an undertaking be given. Being a discretionary remedy and one founded on equity, the court must have regard to the essential justice of the case (see p 522C–F).

(4) The complaint here was a most grave and pressing matter, as was impressed upon this court by the plaintiff in his own application, and surely, one that required immediate attention and compelling action. The plaintiff need not have waited until after the writ was filed to seek this interlocutory relief. He should have acted promptly upon the proclamation coming to his knowledge. Discretionary remedies being exceptional in nature, should not be made available to those who sleep on their rights. In the instant case, the plaintiff's prolonged slumber of some 40 months was certainly inexcusable (see pp 520I–521C).

Obiter:

The application before this court was defective and one wanting in procedure. There was no machinery to enable the plaintiff to apply for an interlocutory injunction by a motion to a judge in open court. An application that failed to comply with a mandatory procedural requirement is was and could not stand. A fundamental breach of an expressed requirement had occurred and one not curable under O 2 of the RHC. It was unfortunate that this matter was not earlier brought to the court's attention for, if it had been, a summary striking out of this motion would not have been inappropriate in the circumstance (see pp 522I–523C).

[Bahasa Malaysia summary

Plaintif merupakan seorang ahli perniagaan dan pengedar tunggal berbagai jenis barangan kesihatan dan penjagaan kulit. Beliau juga merupakan bekas ahli Parlimen dan ahli dewan undangan negeri. Defendan pertama ('CTOS') merupakan syarikat maklumat pangkalan data komputer yang mengumpul semak maklumat daripada suratkhabar, warta kerajaan, pejabat-pejabat pendaftaran perniagaan dan syarikat-syarikat dan menyimpannya di dalam arkib elektroniknya untuk maklumat pelanggan-pelanggannya termasuk bank-bank. Defendan kedua ('*The Star*') adalah penerbit suratkhabar harian yang popular dan defendan ketiga merupakan pencetak defendan kedua. Pada Mei tahun ini, plaintif telah memfailkan guaman terhadap defendan menuntut ganti rugi untuk fitnah dan untuk relif-relif injunksi. Di dalam permohonan ini, plaintif memohon untuk injunksi interlokutori sementara menunggu penyelesaian guaman untuk memberhentikan defendan-defendan daripada, inter alia, menerbitkan suatu proklamasi jualan ('proklamasi tersebut'). Defendan-defendan membangkitkan dua bantahan awal kepada permohonan ini. Pertamanya, telah dihujahkan bahawa affidavit sokongan tidak mengandungi sebarang akujanji untuk ganti rugi. Kedua yang dihujahkan adalah bahawa telah berlaku kelewatan selama 40 bulan dalam memohon relif injunksi tersebut, dan kelewatan ini tidak beralasan. Isu utama untuk ditentukan adalah sama ada mahkamah boleh memberi injunksi interim di dalam guaman fitnah.

Diputuskan, menolak permohonan tersebut:

(1) Mahkamah tidak sepatutnya tergesa-gesa memberikan injunksi interim dalam guaman fitnah. Mahkamah hanya boleh memberikan injunksi sebegini jika faktor-faktor seperti berikut dipuaskan: (i) pernyataan tersebut adalah fitnah; (ii) tiada alasan untuk memutuskan bahawa pernyataan tersebut adalah benar; (iii) tiada pembelaan yang mungkin berjaya; dan (iv) terdapat keterangan yang menunjukkan niat untuk mengulangi ataupun menerbit fitnah tersebut. Beban membukti jatuh ke atas plaintif dan bukan defendan-defendan. Di dalam permohonan ini, plaintif gagal memuaskan mahkamah di atas ketiga-tiga faktor tersebut (lihat ms 517F, 519B, 520D–E).

(2) Proklamasi yang dikatakan, pada dasarnya, adalah iklan biasa yang diterbitkan dalam *The Star*, sebagai urus niaga sehari-hari. Plaintif gagal memuaskan mahkamah ini bahawa proklamasi tersebut dibuat dengan niat jahat. Rayuan perlindungan bersyarat defendan kedua dan ketiga sepatutnya dipertimbangkan oleh mahkamah sebagai pembelaan yang prima facie bona fide dalam menolak permohonan untuk injunksi interim (lihat ms 519G–H).

(3) Borang 58 Keadah-Keadah Mahkamah Tinggi 1980 ('KMT'), iaitu borang untuk perintah untuk injunksi interim, menunjukkan

bahawa mahkamah, melalui budi bicaranya boleh memberi perintah supaya plaintif memberi akujanji ganti rugi. Jika mahkamah berpendapat bahawa, setelah menyiasat bahawa defendan akan menanggung kerugian oleh kerana injunksi tersebut, mahkamah boleh membuat perintah akujanji. Jelas bahawa perintah aku janji ini adalah pada budi bicara mahkamah. Kegagalan plantif dalam menyediakan aku janji di dalam afidavitnya atau permohonannya tidak membawa padah, dan di bawah KMT, ia tidak merupakan keperluan yang mandatori, walaupun, sebagai amalan, dengan kekecualian, mahkamah menghendaki aku janji sedemikian diberi. Sebagai remedi yang mengikut budi bicara dan berdasarkan ekuiti, mahkamah mestilah mengambil berat terhadap keadilan kes tersebut (lihat ms 522C–F).

(4) Aduan di dalam kes ini adalah perkara yang serius dan mendesak, seperti yang ditekan oleh plaintif di dalam afidavitnya dan merupakan perkara yang memerlukan perhatian segera dan tindakan mendorong. Plaintif tidak perlu menunggu sehingga writ difailkan sebelum memohon untuk relif interlokutari tersebut. Beliau sepatutnya bertindak sebaik sahaja selepas beliau mendapat tahu mengenai proklamasi tersebut. Remedi yang mengikut budi bicara tidak sepatutnya diberi kepada pemohon yang tidak bertindak dengan segera. Di dalam kes ini, kegagalan plaintif untuk bertindak selama 40 bulan tidak dapat dimaafkan (lihat ms 520I–521C).

Obiter:

Permohonan di hadapan mahkamah ini adalah cacat dan tidak mengikut prosedur. Plaintif tidak boleh memohon untuk injunksi interlokutari melalui usul kepada hakim di dalam mahkamah terbuka. Permohonan yang tidak mengikut prosedur mandatori akan membawa padah. Kemungkiran asasi peruntukkan yang nyata telahpun berlaku dan tidak dapat dibetulkan di bawah A 2 KMT. Jikalau perkara ini dibawa kepada perhatian mahkamah terlebih dahulu, pembatalan terus usul ini tidak boleh dikatakan tidak patut di dalam situasi ini (lihat ms 522I–523C).

Notes

For cases on interim injunction generally, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2626–2706.

For cases on an injunction in a defamation action, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 253–257.

Cases referred to

Allen & Ors v Jambo Holdings Ltd & Ors [1980] 2 All ER 502 (refd)

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504 (refd)

Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd [1993] 1 MLJ 283 (refd)
Best Electronics Sdn Bhd v Chen Li Yeng [1997] MLJU 167 (refd)
Bonnard v Perryman [1891] 2 Ch 269 (refd)
Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 (refd)
Coulson v Coulson (1887) 3 TLR 846 (refd)
Delbert-Evans v Davies and Watson [1945] All ER 167 (refd)
Evercrisp Snack Products (M) Sdn Bhd & Anor v Sweeties Food Industries Sdn Bhd [1980] 2 MLJ 297 (refd)
Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor [1986] 2 MLJ 198 (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)
Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors [1992] 2 MLJ 10 (refd)
Lim Kit Siang v United Engineers (M) Bhd & Ors (No 2) [1988] 1 MLJ 50 (refd)
Mogul Steamship Co v M'Gregor, Gow & Co (1885) 15 QBD 47 (refd)
Murray Hiebert v Chandra Sri Ram [1999] 4 MLJ 321 (refd)
New Straits Times Press (M) Bhd, The v Airasia Bhd [1987] 1 MLJ 36 (refd)
Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor [1994] 1 MLJ 156 (refd)
Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (refd)
Quartz Hill Consolidated Gold Mining Co v Beall (1882) 20 Ch D 501 (refd)
Rajamanikam a/l Adaikalam v Bolton Finance Bhd [2000] 3 MLJ 454 (refd)
Seema Development Sdn Bhd v Mah Kim Chye & Anor [1997] MLJU 235 (refd)
Si Rusa Beach Resort Sdn Bhd v Asia Pacific Hotels Management Pte Ltd [1985] 1 MLJ 132 (refd)

Legislation referred to

Defamation Act 1957 s 12(1)
Rules of the High Court 1980 O 29 rr 1(2), 2A, Form 58

Ngan Siong Hing (*Abbas & Ngan*) for the plaintiff.
Harris Ibrahim (*Nor Isman* with him) (*Liza Chan & Co*) for the first defendant.
Bhag Singh (*Bhag Sulaiman & Co*) for the second and third defendants.

Abdull Hamid Embong J. : In this application, the plaintiff sought for an interlocutory injunction pending the disposal of this suit to restrain the defendants from, inter alia, publishing and communicating a proclamation of sale ('the proclamation') set out in the following words:

A

Proclamation of sale

Between

MBF Finance Bhd — Assignee/Lender

And

Ngoi Thiam Woh — Assignor/Borrower
(NRIC No 530922–08–5273)

B In the exercise of the rights and powers conferred upon the assignee/lender under a loan agreement cum deed of assignment, both dated 19 November 1994 between the assignor/borrower and the said assignee/lender, it is hereby proclaimed that the assignee/lender with the assistance of the undermentioned auctioneer:

C Will Sell by Public Auction
On Friday the 23rd day of January 1998
In the premises at No 117, 1st Floor
Bangunan Persatuan Melayu
Jalan Macalister, 10400 Pulau Pinang.

The subject property is a hotel suite known as No 4, on the 5th Floor of Sandy Bay Paradise Hotel, Jalan Tanjung Bungah, Penang.

D Particulars of title
Title: No individual title
Floor area: 70.14 square metres (755 square feet)
Beneficial owner: Ngoi Thiam Woh
Encumbrances: Assigned to MBF Finance Bhd.

E Location and description of the property: The subject property is a one bedroom hotel suite within Sandy Bay Paradise Hotel which is located on the north side of Jalan Tanjung Bungah at about 10 km north-west of the city center and a km east of Tanjung Bungah town. The subject property accommodates a living/dining area, a kitchen, a bedroom, a bath/wc and two balconies.

F Reserve price:

The property will be sold subject to a reserve price of RM275,000 (Ringgit Malaysia Two Hundred And Seventy Five Thousand Only).

G All intending bidders are required to deposit with the auctioneer a sum equivalent to 10% of the reserve price by bank draft in favour of Messrs Maxwell, Kenion, Cowdy & Jones before the auction sale. For further particulars please apply to Messrs Maxwell, Kenion, Lowdy & Jones at Wisma Makencone, No 31 Jalan Tun Sambanthan, 30000 Ipoh, Perak Darul Ridzuan; tel 05-2551225, or to the undermentioned auctioneer.

H 77-C, Jalan Datuk Haji Eusoff, M Mogan
Damai Complex — Licensed Auctioneer
50400 Kuala Lumpur.
Tel: 03-4427528 / Atur: 012-3374424; or
Syarikat Daya Maju
No 117, 1st Floor, Bangunan Persatuan Melayu
Jalan Macalister, 10400 Pulau Pinang.
Tel: 04-2287270

I The plaintiff is a businessman and the sole distributor of a wide range of health and skin care products. He was also formerly a member of Parliament and a state assemblyman. The first defendant ('CTOS') is a

computer database information company which collates information from newspapers, government gazettes, the registries of businesses and companies, etc and store them into its electronic archive for the information of its customers which include banks. The second defendant, Star Publications Bhd ('*The Star*') is the publisher of a popular daily national tabloid who first published the proclamation in its newspaper on 9 January 1998. The third defendant (Star Papyrus Printing Sdn Bhd) is described as the printer of *The Star*.

The plaintiff had, in May this year, filed this suit against the defendants seeking damages for defamation and for the injunctive reliefs. The proclamation was first published in *The Star*, and that publication was picked up by CTOS and fed into its database for distribution to its customers. Learned counsel for the plaintiff submitted that since the information remained on CTOS's database, and that it has a website which can be assessed worldwide, the plaintiff, being a businessman with overseas interest, would face hardship and be permanently disgraced if the publication of that information is not stopped forthwith. He also submitted that further publication of the information is tantamount to a sub judice act by CTOS since there is now a related defamation suit in the Penang High Court ('Penang suit') involving the same parties. Learned counsel also contended that it falls upon CTOS to prove that the information published in its database is true.

The defence had raised two preliminary objections to this application, which after hearing, this court had decided to treat them as substantive arguments affecting the merits of the plaintiff's application. Firstly, it was submitted that the affidavit in support did not offer any undertaking for damages. Secondly, it was submitted that there had been a long delay of 40 months in seeking this injunctive relief, a delay for which there was no plausible explanation.

On the sub judice point, it was argued by the defendants that this amounted to a criminal contempt, which is the domain of the Attorney General, and the proper recourse is to move the Penang High Court to cite CTOS for contempt.

The test for publication contempt is laid down in the recent Court of Appeal decision in *Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321 which is 'if it is likely or tends to interfere with the proper administration of justice'. Although it was held in that case that mens rea is not a necessary ingredient, the Court of Appeal had cited with approval the words spoken by Lord Parker CJ in *Delbert-Evans v Davies and Watson* [1945] All ER 167 who said:

> Whether at the date of publication of the article in question was calculated to prejudice the fair hearing of the proceedings.

The test is to be applied and analyzed to the whole article, in the instant case, the proclamation. The plaintiff had not adverted to any part of the proclamation to say that it was published in order to prejudice the fair hearing of the Penang suit, and thus, contemptuous. The original

proclamation, as advertised in *The Star*, was published prior to the filing of the Penang suit and obviously cannot be said to likely prejudice the proper administration of that suit. If assuming that its continuing publication by CTOS would now offend the test, the proclamation would still in my view require the scrutiny of the court with the proper jurisdiction to evaluate this issue. In my view, that forum is not here since the jurisdiction of this court, for the moment, is not in dealing with the issue of sub judice. In any event, a cursory reading of the proclamation does not show that it is likely to interfere or impede with the Penang suit. The plaintiff too had not shown to this court — and the burden is his — which part of the proclamation would likely prejudice and how it would intrude into the Penang suit. To me, this thus, is truly a non issue.

It was also submitted by the defence that the words complained of as being defamatory of the plaintiff were not disclosed in the supporting affidavit. The defence had adverted to the phrases 'these publications', 'such information' and 'such unjustified and false publications', stated in the plaintiff's affidavit as being too general and without particularization of the specific allegation of defamation, and as such, the supporting affidavit did not disclose the facts and ingredients to found the injunctions sought. I do not propose to deal with this issue in this proceeding as I feel that it be best left for the trial court when determining the suit proper, and when the merits of the action can be fully adjudicated. It would not be appropriate for this court to express any opinion upon the merits of this suit at this juncture. Furthermore, the disposal of this application is sufficiently grounded on other considerations, as discussed below. Lastly, it was submitted by the defence that interlocutary injunctions in defamation suits should not be readily granted since it transgressed one's right to free speech. The defence also contended that the burden is on the plaintiff to show that the information published is untrue.

The primary issue for determination turns out to be whether this court may grant an interim injunction in a defamation action. Therefore, I take the last point first. This court subscribes to the view that it should be slow in granting an interim injunction in a defamation action. In the Supreme Court's case of *The New Straits Times Press (M) Bhd v Airasia Bhd* [1987] 1 MLJ 36, the respondent had applied for an interim injunction to restrain the appellants from publication of articles or words allegedly defamatory of the respondent which the High Court allowed. On appeal, it was held by the Supreme Court that the learned judge had erred in law when he exercised the power to grant the interlocutory injunction contrary to the established principle governing the issue of interim injunctions in libel actions. The Supreme Court in coming to its decision, had cited a passage from *Bonnard v Perryman* [1891] 2 Ch 269, where Lord Coleridge CJ had said:

> The right of free speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right

> at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions. We entirely approve of, and desire to adopt as our own, the language of Lord Esher, MR in *Coulson v Coulson* (1887) 3 TLR 846 — 'To justify the court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether is was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable.

The Supreme Court, in the concluding paragraphs of its judgment, made the following observations on the principle guiding the grant of an interlocutory injunction in a libel action:

> The principle has clearly emerged by reason of the fact that the questions of libel or no libel are eminently matters to be decided on facts at the trial and there is also the question of the proper meaning to be assigned to the words used in a particular statement. To restrain a defendant before the questions are determined would amount to fettering with free speech. Indeed it is because of the importance of leaving free speech unfettered that the court must be slow in issuing interim injunction in a libel action.
>
> In applying these principles, value is placed by the court upon the freedom of speech which is related to the freedom of the press when balancing it against the reputation of a single individual who, if wronged, can be adequately compensated in damages. The court should act cautiously in granting interim injunction to restrain publication of an alleged defamatory statement. In fact it should not grant the injunction where the defendant says he is going to justify it at the trial of the action except where the statement is obviously untruthful or where the plaintiff has satisfied the court that the defence will fall. That was made clear by Denning MR in *Harakas v Baltic Exchange* [1982] 2 All ER 701.

The principle also shows that no interim injunction shall be granted if the defence raised is that of justification, fair comment or privilege (*Quartz Hill Consolidated Gold Mining Co v Beall* (1882) 20 Ch D 501). In the instant case, the second and third defendants had also in their defence raised the plea of privilege, which, according to the principle so strongly advocated by our highest court, must seemingly be a bar to a free grant of an interim injunction, unless the statement is 'obviously untruthful'. It should also be noted here that the Supreme Court also held that the guidelines governing the grant of interlocutory injunctions enunciated by the House of Lords in that celebrated case, *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, are not applicable in actions for defamation.

In *Gatley on Libel and Slander*, the learned authors opined that the jurisdiction of the court to grant an interim injunction in defamation actions is of a delicate nature and will only be exercised with great caution. It will not be exercised unless there is strong prima facie evidence that the statement complained of is untrue. In *Coulson v Coulson* (1887) 3 TLR 846, Lord Esher MR said that 'the court must be satisfied that in all probability, the alleged libel is untrue'. Now, even if this court is satisfied that the words complained of are prima facie, libellous and untrue, it would still refuse to

grant an interim injunction if those words are prima facie privileged, unless it found that the defendants were actuated by malice. It seems to me that the plaintiff here needs to overcome these two hurdles, ie one to prove that the statement was untrue and secondly, in the face of the plea of qualified privilege by the second and third defendants, that these defendants were actuated by malice. And, from the authorities, this burden of proof falls upon the plaintiff, and not on the defendants to prove otherwise, as was incorrectly contended by plaintiff's counsel. As for the continuing publication of the statement by CTOS, this court must be satisfied that immediate and irreparable injury will result to the plaintiff in order to allow the granting an interim injunction.

In *Mogul Steamship Co v M'Gregor, Gow & Co* (1885) 15 QBD 476, Lord Coleridge CJ stated his views on this consideration in the following passage:

> Next, this does not appear to me to be a case in which, as I was at one time inclined to think, the plaintiffs can sustain irreparable injury by our declining to grant the relief prayed. It may be that they will suffer some damage; it may be that they will for a time have a difficulty in carrying on their China trade, or may have to carry it on at a loss. But injury of that sort differs altogether from the injury which is called 'irreparable', to prevent which injunctions have heretofore been granted in the Court of Chancery, and are now allowed to issue from this court. For instance, if a fine old ornamental tree in a nobleman's park be cut down, the injury is practically irreparable, and cannot be compensated in damages. It is in cases of that nature that an interim injunction issues. The injury here, if it be made out, obviously is not one of that character.

The issues stated above are questions of facts to be determined at the trial proper. The Master of the Rolls in *Coulson*'s case puts it this way:

> To justify the court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury decided it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only be exercised in the clearest cases, where any jury would say the matter complained of was libellous, …. (see also *Bonnard v Perryman* (1891) 2 Ch D 269).

The proclamation complained of is, on the face of it, a usual advertisement published in the *Star*, pursuant to its normal day to day transaction. The plaintiff had not satisfied this court that the proclamation was published out of malice. The plea of qualified privilege by the second and third defendants should therefore be considered by this court as a prima facie bona fide defence in refusing the grant of an interim injunction. Section 12(1) of the Defamation Act 1957 provides that:

> Subject to the provisions of this section, the publication in a newspaper of any such report or other matter as is mentioned in Part I of the Schedule to this Act shall be privileged unless the publication is proved to be made with malice.

The question on whether that defence is justiciable or will succeed or not is a matter to be decided later by the trial judge whose duty is to evaluate the

evidence. For the moment, it is only necessary for this court to determine whether the proclamation is obviously untrue, which I find it not to be.

On the principle referred to above which had stood over a century and sanctioned here by our Supreme Court in *Airasia's* case, this court, on this ground alone, is constrained to dismiss this application. It seems to me that the thrust of the principles enunciated by those illustrious authorities is rooted in the importance attached to the right of free speech. Seemingly too, this category of interim injunctions stands apart and does not fall within the principles established in the applications for interlocutory injunctions by *American Cyanamid*, where the court need not consider the merits of the case once it had been shown that there was a serious issue to be tried but to determine where the balance of convenience lay between the parties (see *Si Rusa Beach Resort Sdn Bhd v Asia Pacific Hotels Management Pte Ltd* [1985] 1 MLJ 132, per Abdul Hamid CJ (Malaya), see *Gatley on Libel and Slander* (9th Ed) at p 634).

From those authorities, it would seem that the court may only grant interlocutory injunctions of this species if the following factors, as summarized in *Gatley on Libel and Slander*, are satisfied:

(1) that the statement is unarguably defamatory;

(2) there are no grounds for concluding that the statement may be true;

(3) there is no other defence which might succeed;

(4) there is evidence of an intention to repeat or publish the defamatory statement.

In the instant application, the plaintiff had failed to satisfy this court all of the first three factors abovestated.

I need also to briefly deal with two other issues raised as preliminaries by the defence. The first is the question of delay by the plaintiff in making this application. It is settled law that delay on the part of the plaintiff in seeking an interlocutory injunction may throw considerable doubt on the reality of his alleged injury (see *Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156).

The plaintiff had come to know of the proclamation almost immediately after its publication in *The Star* on 9 January 1998 when, in March of that year, he was warned by the then Bank Bumiputra Malaysia Bhd that his facilities might be terminated in view of his financial predicament as adverted to in the proclamation. Surely then, as a businessman who is concerned about his reputation, he must have been alerted to the consequence of the proclamation and should have taken immediate steps to stop it from jeopardizing his good name. Now, some 40 months later, he is before this court complaining about the publication of this very proclamation, and seeking to restrain the defendants by way of an interim injunction. Learned counsel for the plaintiff had submitted that the suit against the defendants was filed in May this year, and that the plaintiff was well within the statutory limitation period. That may be so, but the complaint here is, in my view, a most grave and pressing matter, as is

now impressed upon this court by the plaintiff in his own application, and surely, one that requires immediate attention and compelling action. The plaintiff in my view, need not have waited until after the writ was filed to seek this interlocutory relief. He should have acted promptly upon the proclamation coming to his knowledge.

The remedy sought here is left to the court's discretion, and as such, even assuming there is now a further need to consider the balance of convenience factor under the *American Cyanamid* principles, in deciding this application, this court is entitled to take into account all discretionary considerations such as delay in the making of this application (see *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193). The Supreme Court in *Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198 had stated that discretionary remedies being exceptional in nature, should not be made available to those who sleep on their rights. In the instant case, the plaintiff's prolonged slumber of some 40 months is certainly inexcusable.

In *Evercrisp Snack Products (M) Sdn Bhd & Anor v Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297, an application for an interlocutory injunction was objected to on the ground of delay of some 22 months, which had not been explained in the plaintiff's affidavit. Hashim Yeop A Sani J (as he then was) held that there was unreasonable delay for which no satisfactory explanation was given and dismissed the motion. Similarly in the instant case, no explanation was given in the plaintiff's affidavit as to why there was this long delay in making this application. This is certainly not helpful to his present cause.

In *Best Electronics Sdn Bhd v Chen Li Yeng* [1997] MLJU 167, there was a 16 month delay in making an application for a Mareva injunction, it was held by the High Court that the plaintiff ought to have moved with promptness and alacrity, that such a delay may give rise to an inference that the plaintiff had not suffered hardship or prejudice (see also *Lim Hean Pin v Thean Seng Co Sdn Bhd & Ors* [1992] 2 MLJ 10). I fully agree with the above cited decisions and for this reason too, this application ought to be dismissed.

Next, the issue of giving an undertaking or more aptly in this case, the failure by the plaintiff to give one. Learned counsels for the defendants had questioned the omission by the plaintiff to give an undertaking for damages in his supporting affidavit. The case of *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 was referred to in support of this argument. In that case the learned judge had said that 'an undertaking by a plaintiff as to damages ought to be given on every interlocutory injunction' and had referred to some English authorities. It should however be observed and with greatest respect, that firstly, the learned judge never held that an undertaking is a prerequisite and without one the interim injunction asked for should be withheld. Secondly, his Lordship in my view, was merely stating the usual practice of the courts when granting interim injunctions but had not referred to or discussed the regulatory need of such an undertaking under our Rules of the High Court

1980 ('the RHC'). This case thus is of no assistance to the proposition by the defence and my research shows none to say that it is a mandatory statutory requirement and one that needs to be averred by the plaintiff in either his supporting affidavit or application. In *Rajamanikam a/l Adaikalam v Bolton Finance Bhd* [2000] 3 MLJ 454, the High Court had held that it is trite law that an applicant for an interlocutory injunction must give his undertaking to damages in the said application. That view was taken based on English authorities which recognized the practice in England since the middle of the 19th century to grant interlocutory injunctions subject to the giving of an undertaking to pay damages. The High Court in coming to its conclusion had not considered this requirement under our RHC and, with greatest respect, that decision should be treated as one per incuriam on this question, and from which is now differed.

Indeed, O 29 r 1 of the RHC does not provide for such a requirement. Nor, under r 2A, for the affidavit in support, is there a requirement for an applicant to declare an undertaking. However, as correctly pointed out by plaintiff's counsel, Form 58, ie the form for an order for interim injunction shows that the court, in its discretion, may order that the plaintiff gives an undertaking as to damages. This order on an undertaking may, in my view, be made by the court if it is of the opinion, after enquiring into the matter that a defendant would sustain some damages as a result of the injunction granted. Clearly then, this order on the undertaking is left to the court's discretion. The omission to provide for an undertaking for damages in the plaintiff's affidavit or his application is thus, in my view, not fatal, and that under the RHC, it is a non-mandatory requisite although the general practice, with some exceptions (eg in public interest litigation — see *Lim Kit Siang v United Engineers (M) Bhd & Ors (No 2)* [1988] 1 MLJ 50 or where the Government is seeking for the injunction) is for the court to require that such an undertaking be given. Being a discretionary remedy and one founded on equity, the court must have regard to the essential justice of the case. An undertaking including a cross undertaking, may be orally requested by either party during the proceedings, or the court itself in the exercise of its discretion, may embark on an enquiry on the need of such an undertaking. Even in a Mareva injunction situation, an undertaking is flexible in its application (see *Seema Development Sdn Bhd v Mah Kim Chye & Anor* [1997] MLJU 235, and *Allen & Ors v Jambo Holdings Ltd & Ors* [1980] 2 All ER 502).

A more pertinent matter however and one not raised in submission, is the mode of the application made by the plaintiff to secure this interim injunction. This court in the instant application was moved by an inter partes originating motion. Order 29 r 1(2) of the RHC says that:

> Where the applicant is the plaintiff and the case is one of urgency such application may be made ex parte by summons supported by an affidavit but, except as aforesaid, *such application must be made by summons*. (Emphasis added.)

Clearly therefore, the application before this court is defective, and one wanting in procedure. Similarly, in England, in the QBD, there is no

machinery to enable the plaintiff to apply for an interlocutory injunction by a motion to a judge in open court (see the *Supreme Court Practice 1997* (Vol A) para 29 January 1997). It is now trite law that the qualifying word 'must' under the RHC assigns to it a mandatory requirement (see *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85). It need not be overly emphasized that an application that fails to comply with a mandatory procedural requirement is fatal and could not stand. It is my finding therefore, that a fundamental breach of an expressed requirement has occurred and one not curable under O 2 RHC (see *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283). It is unfortunate that this matter was not earlier brought to the court's attention for, if it had been, a summary striking out of this motion would not have been inappropriate in the circumstance.

For these reasons, this application is dismissed with costs.

Application dismissed.

Reported by Wong Siok Chin